Testimony of Richard T. Karcher

Oversight Hearing on "The Arbitration Process of the National Football League Players Association"

December 7, 2006

Mr. Chairman and Members of the Subcommittee,

Good morning. Thank you for providing me the opportunity to provide testimony today regarding the NFLPA's use of the laws as a shield to interpret its regulations however it deems fit and to exercise unfettered discretion in imposing any number of sanctions, including suspension and revocation of an agent's license. My perspective on the issue comes from three different vantage points: As a former minor league baseball player, as a former partner at a large and prestigious corporate law firm, and now as a full time sports law professor.

I have reviewed the NFLPA's agent regulations. The current version of those regulations, as amended through March 2006, is available at http://www.nflpa.org/pdfs/Agents/NFLPA_Regulations_Contract_Advisor.pdf. I have also reviewed the current version of the collective bargaining agreement (CBA) between the NFL and the NFLPA relating to agent certification and the resolution of disputes between the parties to the CBA. I request that my written statement and attachments be included in the record.

There is no dispute among anybody here at the table, or the general public for that matter, that the sports agent business is highly competitive and cutthroat, involving all sorts of agent misconduct. However, the underlying discussion today involves two fundamental questions. The first is the substantive question as to whether the NFLPA is enforcing its agent regulations in a manner that is unreasonable or arbitrary. The second is the procedural question as to whether agents are afforded the basic rudiments of due process of law.

I. The NFLPA's Disciplinary Process

As the "exclusive" representative of the players under the labor laws, the NFLPA has determined that it is in the best interest of the players to have a player representation system that involves the use of third party agents. Thus, the union has delegated to third party agents its authority to negotiate the individual contracts of the players. In conjunction therewith, the unions have established strict regulations that agents must abide by in order to be certified and represent players. The CBA provides that "[t]he NFLPA shall have sole and exclusive authority to determine the number of agents to be certified, and the grounds for withdrawing or denying certification of an agent." (CBA, Article VI, Section 1). The CBA further provides that clubs will be fined $10,000 if they

negotiate any player contract with an agent not certified by the NFLPA in accordance with the NFLPA agent regulation system. (CBA, Article VI, Section 3)

The current version of the NFLPA regulations contains 30 separate provisions addressing prohibited agent conduct. Some provisions are very specific in stating what particular conduct is prohibited, for example, the initiation of any direct or indirect communication with a player represented by another agent (Section 3. B. 21(a)). Some provisions do not specify what particular conduct is prohibited but ban a specific outcome, for example, engaging in any activity "which creates an actual or potential conflict of interest with the effective representation of NFL players" (Section 3. B. 8.). Finally, some provisions are open-ended with respect to the prohibited conduct and outcome, for example, any activity "which reflects adversely on his/her fitness as a Contract Advisor or jeopardizes his/her effective representation of NFL players." (Section 3. B. 14.). Pursuant to the terms of the regulations, agents are deemed to have consented to all of the provisions in the regulations as a result of the certification process.

It is worth noting that state and federal statutes designed to aggressively combat agent misconduct are much more specific and narrowly define what an agent cannot do. For example, the Uniform Athlete Agents Act (2000), which has been adopted in 35 states, provides as follows:

> SECTION 14. PROHIBITED CONDUCT.
>
> (a) An athlete agent, with the intent to induce a student-athlete to enter into an agency contract, may not: (1) give any materially false or misleading information or make a materially false promise or representation; (2) furnish anything of value to a student-athlete before the student-athlete enters into the agency contract; or (3) furnish anything of value to any individual other than the student-athlete or another registered athlete agent.
>
> (b) An athlete agent may not intentionally: (1) initiate contact with a student-athlete unless registered under this [Act]; (2) refuse or fail to retain or permit inspection of the records required to be retained by Section 13; (3) fail to register when required by Section 4; (4) provide materially false or misleading information in an application for registration or renewal of registration; (5) predate or postdate an agency contract; or (6) fail to notify a student-athlete before the student-athlete signs or otherwise authenticates an agency contract for a particular sport that the signing or authentication may make the student-athlete ineligible to participate as a student-athlete in that sport.

The federal Sports Agent Responsibility and Trust Act (2003)(SPARTA) defines prohibited conduct narrowly as well:

> (a) Conduct Prohibited.--It is unlawful for an athlete agent to--
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> (1) directly or indirectly recruit or solicit a student athlete to enter into an agency contract, by--
>
> (A) giving any false or misleading information or making a false promise or representation; or
>
> (B) providing anything of value to a student athlete or anyone associated with the student athlete before the student athlete enters into an agency contract, including any

> consideration in the form of a loan, or acting in the capacity of a guarantor or co-guarantor for any debt;
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> (2) enter into an agency contract with a student athlete without providing the student athlete with the disclosure document described in subsection (b); or
>
> (3) predate or postdate an agency contract.

When I was practicing as a corporate lawyer, if I had allowed my client to sign a document in a commercial transaction containing provisions analogous to the NFLPA regulation's ambiguous and open-ended terms, I would have most likely committed an act of malpractice. Ordinarily, in a dispute between the parties as to the meaning of the terms of a contract, a court or jury determines whether the provisions are ambiguous as well as ascertain the intent of the parties. One could even argue that the NFLPA's regulations are akin to an unconscionable adhesion contract because agents have no ability to negotiate the terms and they have no choice but to "take it or leave it". The NFLPA also unilaterally amends its regulations without the consent of agents and the input of, or negotiation with, agents. Therefore, agents have not actually agreed to the regulations, but instead are forced to accept their terms. The NFLPA takes the position that its regulations cannot be challenged by agents, relying on two federal court cases holding that the regulations are exempt from antitrust attack.[1] However, the issue presented here today involves concerns over fairness and due process with respect to individuals accused of misconduct, not the goals of the Sherman Act in preserving competition.

Agents have an extremely difficult time challenging the meaning of any provision in the agent regulations because the law affords private associations the discretion to interpret their own rules and regulations. In *Crouch v. NASCAR*, 845 F.2d 397 (2nd Cir. 1988), NASCAR's regulations permitted drivers to file an appeal to NASCAR's headquarters when a track official's ruling constituted a race "scoring" decision, but did not permit appeals when the ruling involved a race "procedure" decision. The court held, "[W]e conclude that the district court should have deferred to NASCAR's interpretation of its own rules in the absence of an allegation that NASCAR acted in bad faith or in violation of any local, state or federal laws." *Id*. at 403.

Within the last three years, the NFLPA has been aggressively disciplining agents and using the existing legal landscape as a shield in making its own subjective determinations as to what constitutes misconduct. However, unlike the situation in *NASCAR*, the NFLPA's interpretations substantially affect the livelihood of individuals and their freedom to engage in their chosen profession. Agents are operating under a system in which there are no written opinions issued by the union's disciplinary committee -- all that is required is that the committee issue a complaint that merely sets forth the specific action or conduct giving rise to the complaint and cites the regulation alleged to have been violated (Section 6 B.). Also, when the law permits the NFLPA to make its own interpretations about what constitutes misconduct, it requires the NFLPA to

[1] *See* Collins v. National Basketball Players Ass'n, 976 F.2d 740 (10th Cir. 1992)(unpublished), *aff'g*, 850 F. Supp. 1468 (D. Colo. 1991) (alleging that the NBPA's certification process constituted a group boycott as a result of being denied certification).

make subjective assessments about particular agents over others. Those decisions will naturally be affected by certain biases that the union may or may not have against certain individual agents, which then has the potential to result in arbitrary enforcement. I will now briefly summarize three separate instances that raise some questions about whether the NFLPA's authority and power to discipline the agents is being abused.

A. David Dunn's Two-Year Suspension

Soliciting clients represented by other agents is, unfortunately, commonplace in the agent business. But the NFLPA singled out David Dunn for soliciting clients after he left his partnership with Leigh Steinberg, and suspended his license for two years. Aside from the issue of selective enforcement and the substantial impact that the suspension has on Dunn's livelihood, there are additional questions raised by this suspension. First, there is wide debate among lawyers, scholars and judges as to whether solicitation in the agent business is even bad to begin with. In *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862 (7th Cir. 1999), Ivan Rodriguez was solicited by an agent and promised millions in endorsements at a time when he was already represented by Speakers of Sport. The Seventh Circuit, in dismissing the suit, stated that "[a]llowing Speakers to prevail would hurt consumers by reducing the vigor of competition between sports agents. The Rodriguezes of this world would be disserved, as Rodriguez himself, a most reluctant witness, appears to believe." *Id*. at 868. Secondly, Dunn's suspension raises questions when his clients, who are members of the union, strongly oppose any action against him whatsoever, let alone a two-year suspension:

> *Drew Bledsoe*: "It's ridiculous. There is no reason for the [players association] to be seeking punishment against Dave after so many NFL players freely chose Dave to continue as their representative after he left Leigh Steinberg's firm to start Athletes First."
> *John Lynch*: "The decision to discipline Dave is misguided and completely unjustified. He did nothing wrong, and frankly, I am astounded that the union didn't call me, one of its members, to learn the truth before taking this step." Liz Mullen, *NFLPA's vote to suspend Dunn shows it will take on big agents*, Street & Smith's Sports Business Journal Oct. 23-29, 2006.

Finally, one must question whether a two-year suspension is warranted when the conduct involves soliciting clients *that he used to represent*. Under the agent regulations, the NFLPA instead could have exercised discretion and issued a fine or prohibited him from representing any new player-clients for a specified period of time.

B. Carl Poston's Two-Year Suspension

LaVar Arrington has echoed similar statements in favor of his agent, Carl Poston, in the context of Poston's two-year suspension for alleged malpractice in the negotiation of Arrington's contract with the Redskins. In Poston's situation, the union first filed a grievance on behalf of Arrington against the Redskins for bad faith negotiations in the Redskins' failure to include a $6.5 million bonus in the contract that Arrington signed in

Washington without the presence of Poston, despite the fact that Poston had not "signed off" on the language of the contract. The NFLPA's disciplinary committee subsequently filed an action against Poston for malpractice and recommended a two-year suspension.

Poston's situation also raises interesting questions. First, it seems highly suspect that Poston would just overlook a $6.5 million bonus in the contract of one of his elite clients. Carl is notorious for being a zealous advocate on behalf of his clients and obtaining some record-breaking contracts over the years. Secondly, Poston has a financial incentive to make sure the dollars are accurately stated in the contract when his commission fee is based upon the value of the contract. Third, what constitutes agent malpractice in this industry is an unsettled question in and of itself. In any event, at a minimum, there is a factual dispute as to whether Poston breached his duty owed to Arrington. Thus, another question is whether this is a dispute better left between Arrington and Poston. However, Arrington is not upset with Poston, but instead Arrington is upset with the union for suspending his agent. Again, as with the Dunn suspension, is a two-year suspension warranted under the circumstances? The issue also raises some due process concerns as will be discussed shortly.

C. Neil Cornrich's One-Year Suspension

Neil Cornrich had his license suspended by the union for one year for allegedly violating the conflict of interest provision previously noted. According to the union, Cornrich was paid $1,000 per hour by General Motors to testify at a deposition that the earning capacity of an NFL player, who was not his client, was on the decline before he died in an accident while driving a Chevrolet Suburban. This deposition testimony contradicted that of the player's agent, Leigh Steinberg. The player's family sued GM and the circuit court found that GM was not at fault. The NFLPA asserted that Cornrich was required to avoid conflicts of interest, not only with his own clients but also involving NFL players as a whole.

Like the Dunn and Poston suspensions, the Cornrich suspension raises many questions as well. First, arguably there was no "actual or potential conflict of interest with the effective representation of NFL players." Cornrich was hired as an expert witness based upon his knowledge of player contracts and their market value. While the union owes a duty to the players collectively, Cornrich does not owe a duty to any players he does not represent. Furthermore, he is not employed by the union. In this situation, the union interpreted its conflict of interest provision in a way that is much broader than the way it is actually drafted. It appears the union might have based its decision on emotion, as opposed to a true conflict of interest, because an agent testified against a deceased player. This is evident through a comment made by arbitrator Roger Kaplan when he upheld the union's one-year suspension: "The act of undermining the case of a dead, former player makes him appear less able or disposed to be of genuine and unalloyed assistance to NFL players." Nick Cafardo, *He's a chip off the old blocker*, The Boston Globe (December 18, 2005). The second question raised is why the union was so adamant in suspending Cornrich, when the issue of damages for which he testified never even became an issue in the case because the jury found that GM was not at fault.

Thus, even if it was a conflict, there was no harm flowing from the conflict – the only harm was incurred by Cornrich. Once again, it is highly questionable whether the suspension was warranted as opposed to issuance of a fine. Also, the fact that Leigh Steinberg was an adversary to both Dunn and Cornrich in the matters that lead to their suspensions is something that should at least raise an eyebrow.

What is even more intriguing is that there are many known actual and potential conflicts of interest in the agent business that, for some reason, the NFLPA has turned a blind eye to. For example, consolidation in the agency business this year has left one particular agency, lead by former IMG agent Tom Condon, with over 140 NFL clients. No agency has ever had this many clients in one sport under one roof. When an agent represents more than one player in the same position during the same free agency year, it raises questions whether the agent can serve the best interests of all such players, and with 140 clients there is sure to be conflicts. At a minimum, the NFLPA should be investigating it, and maybe they are. Many have questioned whether it is a conflict of interest for Condon to also be representing Gene Upshaw, the Executive Director of the NFLPA. But even if it is not a conflict, it dovetails back to the earlier discussion of potential biases in favor of certain agents which has the natural tendency to result in arbitrary enforcement of the regulations.

II. The Arbitration Process

Under the regulations, the NFLPA's disciplinary committee (comprised of three to five active or retired players appointed by the President of the NFLPA) has the power to immediately suspend or revoke an agent's license without a hearing and without an opportunity to be heard (Sections 6. A. and B.). The agent then has the right to appeal the disciplinary action to an arbitrator, but it is within the committee's discretion whether the pending appeal stays the disciplinary action (Section 6. B.). The parties are not permitted to file pre-hearing or post-hearing briefs. The regulations state: "The NFLPA shall select a skilled and experienced person to serve as the outside impartial Arbitrator for all cases arising hereunder." There is also a provision stating that the fees and expenses shall be borne by the NFLPA. Is an arbitrator that is selected, and paid for, by one of the parties to a dispute really "impartial"? And when the same arbitrator, Roger Kaplan, is selected by the NFLPA for each disciplinary arbitration hearing, is he really an "outside" arbitrator? At what point does he gradually evolve into an "insider" through repeated use?

Once again, it is worth noting that the UAAA and SPARTA provide much greater procedural safeguards when attempting to strip an agent of his livelihood. The UAAA provides that the state may deny, suspend, revoke, or refuse to renew an agent's license only after proper notice and an opportunity for a hearing (UAAA, Section 7(b)). The UAAA even incorporates the Administrative Procedures Act, which affords agents with many due process procedural safeguards. SPARTA mandates that any civil action by a state attorney general against an agent be brought in a district court of the United States with appropriate jurisdiction (SPARTA, Section 5(a)).

It is also worth noting that the collective bargaining agreement between the NFLPA and the NFL contains detailed provisions that provide fair and reasonable process for the selection of an arbitrator in disputes between the players and the league involving non-injury. *See* Article IX attached as Exhibit A. If a grievance is not resolved after it has been filed and answered, any party may appeal to an arbitration panel. The CBA contains detailed provisions on the process of selection of the arbitrators as well as filling any vacancies. There are also detailed provisions regarding discovery, and the arbitrators' fees and expenses are borne equally by the parties. The point here is that the entire arbitration process set forth in the CBA for the resolution of disputes, including the process of selecting the arbitrators, provides for a fair and reasonable arbitration process with due process safeguards.[2] Why shouldn't the same fair and reasonable process be afforded to agents, who are connected to the collective bargaining relationship via their representation of the players in contract negotiations with the clubs?

The NFLPA does not make data readily available pertaining to its arbitration process, including arbitrator Kaplan's written opinions. Nor is there readily available data on the number of times that arbitrator Kaplan has ruled in favor of the agent in arbitration. The NFLPA vigorously fights any agent who seeks a different arbitrator. It is understandable how a disciplined agent would view the NFLPA's arbitration process as just a "rubber stamp". Furthermore, if the agent appeals to the arbitrator and loses, courts typically will not review the arbitrator's decision even if the court believes that there were factual errors made by the arbitrator or that the arbitrator applied the law wrongly.

The case of *Poston v. NFLPA*, No. 02CV871, 2002, WL 31190142 (E.D. Va. Aug. 26, 2002) demonstrates how the agent is "caught between a rock and a hard place" under the NFLPA's system. In 2001, the NFLPA disciplined Poston alleging that one of Poston's employees improperly purchased airline tickets on behalf of four FSU football players and that the employee then attempted to persuade the travel agent who processed the transaction to lie to FSU officials concerning the identity of the purchaser of the tickets. Thus, the NFLPA unilaterally decided two factual issues and imposed disciplinary action. Poston then appealed to arbitrator Kaplan and he affirmed it. Poston then filed suit in federal court to vacate the award alleging "evident partiality" on the part of arbitrator Kaplan, and that arbitrator Kaplan exceeded his powers and misapplied the law of *respondeat superior*. Footnote 6 of the case contains a transcript of the arbitration

[2] There are also detailed provisions regarding the arbitration process for resolving injury grievances (Article X) and other specified contractual disputes, for example, related to drafted players (Article XVI) and veteran free agency (Article XIX). *See* Article XXVII attached as Exhibit A. Pursuant to Article XXVII, the parties must agree on the identity of the arbitrator, and if the parties cannot agree, the parties submit the issue to the President of the ABA who shall submit to the parties a list of eleven attorneys (none of whom shall have nor whose firm shall have represented within the past five years players, player representatives, clubs, or owners in any professional sport). If the parties cannot agree to the identity of the arbitrator from among the names on such list, they alternatively strike names from said list, until only one name remains, and that person shall be the arbitrator. The first strike is determined by a coin flip. The term of the arbitrator is limited to a two year term, unless the parties agree otherwise, and the arbitrator continues to serve for successive two-year terms unless notice to the contrary is given either by the NFL or the NFLPA. The compensation and costs of the arbitrator are borne equally by the NFL and the NFLPA. Finally, the arbitrator has discretion to grant discovery requests by either party. Article XXVII of the CBA would serve as a good model for a revised arbitration process in dealing with agents.

hearing at which Poston disputed the factual determination by the NFLPA that *the employee in fact had done something wrong*. In reviewing Kaplan's decision, the federal district court's hands were tied:

> Accordingly, a district court's review of an arbitration proceeding "is limited to determining whether the arbitrators did the job they were told to do -- not whether they did it well, or correctly, or reasonably, but simply whether they did it." "Courts are not free to overturn an arbitral result because they would have reached a different conclusion if presented with the same facts." Furthermore, courts must give substantial deference to an arbitrator's findings of fact and interpretations of law. Accordingly, an arbitrator's legal determination "may only be overturned where it is in manifest disregard of the law." The arbitrator's award "is enforceable even if the award resulted from a misinterpretation of the law, faulty legal reasoning or erroneous legal conclusion." *Id*. at *2 (citations omitted).

In rejecting Poston's claim of evident partiality, the district court, in reliance on precedent, stated: "An NFL-selected arbitrator may have an incentive to appease his or her employer, but 'the parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen.'" *Id*. at *3 (citations omitted).

As I discussed earlier, it begs the question whether agents really "choose" the dispute resolution method established by the NFLPA.[3] Even assuming *arguendo* that agents validly consent to the regulations, they appear to have consented to an impartial

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[3] The case of *Morris v. New York Football Giants, Inc.*, 575 N.Y.S.2d 1013 (N.Y.Sup. 1991), is instructive. That case involved a dispute between two players and their former clubs over the amount of compensation owed to the players for their services. The player contracts executed by the two players with their clubs provided that, "if no collective bargaining agreement is in existence at such time, the dispute will be submitted within a reasonable time to the League Commissioner for final and binding arbitration by him." *Id*. at 1015. The CBA had expired and, in an attempt to avoid having the commissioner arbitrate the dispute as required by their player contracts, the players argued that the arbitration clause of their contract should be stricken as an unenforceable adhesion contract because they had no opportunity to bargain or negotiate any contract terms other than compensation and length of contractual commitment. *Id*. **Unlike agents who have no ability whatsoever to negotiate any of the NFLPA agent regulations**, the *Morris* court explained that the two players had the ability to negotiate away the arbitration clause:

> "Despite plaintiffs' contentions, the record clearly establishes that plaintiffs are highly paid, sophisticated professional athletes, who possessed considerable bargaining power over the terms of their contracts. They were represented by experienced agents and/or counsel during the negotiation and execution of their player contracts. Significantly, there is absolutely no evidence presented that the plaintiffs ever sought to delete or bargain over the arbitration clause. The arbitration clause is clearly prominently set forth, and is not a trap for the unwary. Nor is there any direct claim made by either plaintiff, by affidavit or otherwise, that they felt that their contracts were presented "on a take-it-or-leave-it basis." *Id*. at 1015-16.

and outside arbitrator, not one that is arguably an "insider". But regardless, the district court stated that Poston "knew or should have known that the arbitrator used in this case is the one regularly used by the NFLPA, and therefore should have raised any concerns regarding the arbitrator's potential partiality prior to the arbitration proceeding at issue."

Ironically, that is exactly what Poston is doing right now. Poston took note of the district court's advice and, in March of this year, filed suit in federal court simultaneously with exercising his appeal rights to the arbitrator. That lawsuit is currently pending, and has raised concerns over the arbitrator's partiality as well as the lack of due process inherent in the system. In late July of this year, the NFLPA officially suspended him for two years after Poston had to twice postpone arbitration hearings as a result of having suffered a serious injury. An AP press release stated that the NFLPA suspended him on the grounds that he used "bad faith efforts to delay, frustrate and undermine" the hearing. NFLPA executive director Gene Upshaw openly criticized Poston for "making a mockery of our system." He further added, "This is not about him, it is about our authority as the exclusive bargaining agent for the players….They, the agents, work at our beck and call." (http://sports.espn.go.com/espn/print?id=2530936&type=story).

Similar to arbitrator Kaplan's comment about Neil Cornrich, Upshaw's comments indicate that the NFLPA is making disciplinary decisions, at least in part, based upon emotion, which can lead to concerns over arbitrary enforcement. Upshaw's comments coupled with the suspension without a hearing also raise questions about procedural fairness and due process. *See NASCAR*, 845 F.2d at 402 (noting an exception to the general rule of nonreviewability of the actions of private associations "where the association had failed to follow the basic rudiments of due process of law.")(quoting *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 544 (7th Cir. 1978)); *Kuhn*, 569 F.2d at 544-45 (held that waiver of recourse clause is invalid as against public policy under circumstances where the waiver of rights to the courts is not voluntary or was not freely negotiated by parties occupying equal bargaining positions).

Rather than fight the uphill battle, David Dunn decided not to even arbitrate his two-year suspension. He acceded to the authority of the NFLPA and agreed to an 18-month suspension. But NFLPA general counsel Richard Berthelsen noted, "This suspension will take Dunn through two drafts and two free agency periods, so it is essentially equivalent to a two-year suspension." Liz Mullen, *Dunn and NFLPA agree suspension will last 18 months*, Street & Smith's Sports Business Journal (Nov. 27, 2006). The settlement seems to suggest that Dunn felt he had no chance whatsoever in defending his case in front of arbitrator Kaplan. As Berthelsen correctly noted, the end result here is essentially a two-year suspension, which is no different than the suspension originally imposed by the NFLPA. So one cannot help but inquire whether this really constitutes a settlement. Indeed, Dunn represents over sixty NFL players. The ramifications of this suspension, which include the strong likelihood that he will lose clients to other agents as well as the lost revenue on contracts he would have negotiated during this suspension period, would seem to give Dunn every incentive to vigorously fight it. He could have at least tried to convince the arbitrator to reduce the suspension to one year. In other words, what does he have to lose? Dunn's suspension raises some

questions regarding due process and overall fairness of the NFLPA's enforcement of its regulations against agents.

In concluding, I hope that my testimony has been helpful to you. I believe that further hearings on this matter are important and warranted. Thank you for your time, and I would be happy to answer any questions you may have.

EXHIBIT A

ARTICLE IX

NON-INJURY GRIEVANCE

Section 1. Definition: Any dispute (hereinafter referred to as a "grievance") arising after the execution of this Agreement and involving the interpretation of, application of, or compliance with, any provision of this Agreement, the NFL Player Contract, or any applicable provision of the NFL Constitution and Bylaws pertaining to terms and conditions of employment of NFL players, will be resolved exclusively in accordance with the procedure set forth in this Article, except wherever another method of dispute resolution is set forth elsewhere in this Agreement, and except wherever the Settlement Agreement provides that the Special Master, Impartial Arbitrator, the Federal District Court or the Accountants shall resolve a dispute.

Section 2. Initiation: A grievance may be initiated by a player, a Club, the Management Council, or the NFLPA. A grievance must be initiated within forty-five (45) days from the date of the occurrence or non-occurrence upon which the grievance is based, or within forty-five (45) days from the date on which the facts of the matter became known or reasonably should have been known to the party initiating the grievance, whichever is later. A player need not be under contract to a Club at the time a grievance relating to him arises or at the time such grievance is initiated or processed.

Section 3. Filing: Subject to the provisions of Section 2 above, a player or the NFLPA may initiate a grievance by filing a written notice by certified mail or fax with the Management Council and furnishing a copy of such notice to the Club(s) involved; a Club or the Management Council may initiate a grievance by filing written notice by certified mail or fax with the NFLPA and furnishing a copy of such notice to the player(s) involved. The notice will set forth the specifics of the alleged action or inaction giving rise to the grievance. If a grievance is filed by a player without the involvement of the NFLPA, the Management Council will promptly send copies of the grievance and the answer to the NFLPA. The party to whom a non-injury grievance has been presented will answer in writing by certified mail or fax within seven (7) days of receipt of the grievance. The answer will set forth admissions or denials as to the facts alleged in the grievance. If the answer denies the grievance, the specific grounds for denial will be set forth. The answering party will provide a copy of the answer to the player(s) or Club(s) involved and the NFLPA or the Management Council as may be applicable.

Section 4. Appeal: If a grievance is not resolved after it has been filed and answered, either the player(s) or Club(s) involved, or the NFLPA, or the Management Council may appeal such grievance by filing a written notice of appeal with the Notice Arbitrator and mailing copies thereof to the party or parties against whom such appeal is taken, and either the NFLPA or the Management Council as may be appropriate. If the grievance involves a suspension of a player by a Club, the player or NFLPA will have the option to appeal it immediately upon filing to the Notice Arbitrator and a hearing will be held by an arbitrator designated by the Notice Arbitrator within seven (7) days of the filing of the grievance. In addition, the NFLPA and the Management Council will each have the right of immediate appeal and hearing within seven (7) days with respect to four (4) grievances of their respective choice each calendar year. The arbitrator(s) designated to hear such grievances will issue their decision(s) within five (5) days of the completion of the hearing. Prehearing briefs may be filed by either party and, if filed, will be exchanged prior to hearing.

Section 5. Discovery: No later than ten (10) days prior to the hearing, each party will submit to the other copies of all documents, reports and records relevant to the dispute. Failure to submit such documents, reports and records no later than ten (10) days prior to the hearing will preclude the non-complying party from submitting such documents, reports and records into evidence at the hearing, but the other party will have the opportunity to examine such documents, reports and records at the hearing and to introduce those it desires into evidence, except that relevant documents submitted to the opposing party less than ten (10) days before the hearing will be admissible provided that the proffering party and the custodian(s) of the documents made a good faith effort to obtain (or discover the existence of) said documents or that the document's relevance was not discovered until the hearing date. In the case of an expedited grievance pursuant to Section 4, such documentary evidence shall be exchanged on or before two (2) days prior to the hearing unless the arbitrator indicates otherwise.

Section 6. Arbitration Panel: There will be a panel of four (4) arbitrators, whose appointment must be accepted in writing by the NFLPA and the Management Council. The parties will designate the Notice Arbitrator within ten (10) days of the execution of this Agreement. In the event of a vacancy in the position of Notice Arbitrator, the senior arbitrator in terms of affiliation with this Agreement will succeed to the position of Notice Arbitrator, and the resultant vacancy on the panel will be filled according to the procedures of this Section. Either party to this Agreement may discharge a member of the arbitration panel by serving written notice upon the arbitrator and the other party to this Agreement between December 1 and 10 of each year, but at no time shall such discharges result in no arbitrators remaining on the panel. If either party discharges an arbitrator, the other party shall have two (2) business days to discharge any other arbitrator. If the parties are unable to agree on a new arbitrator within thirty (30) days of any vacancy, the Notice Arbitrator shall submit a list of ten (10) qualified and experienced arbitrators to the NFLPA and the Management Council. Within fourteen (14) days of the receipt of the list, the NFLPA and the Management Council shall select one arbitrator from the list by alternately striking names until only one remains, with a coin flip determining the first strike. The next vacancy occurring will be filled in similar fashion, with the party who initially struck first then striking second. The parties will alternate striking first for future vacancies occurring thereafter during the term of this Agreement. If either party fails to cooperate in the striking process, the other party may select one of the nominees on the list and the other party will be bound by such selection.

Section 7. Hearing: Each arbitrator will designate a minimum of twelve (12) hearing dates per year, exclusive of the period July 15 through September 10 for non-expedited cases, for use by the parties to this Agreement. Upon being appointed, each arbitrator will, after consultation with the Notice Arbitrator, provide to the NFLPA and the Management Council specified hearing dates for such ensuing period, which process will be repeated on an annual basis thereafter. The parties will notify each arbitrator thirty (30) days in advance of which dates the following month are going to be used by the parties. The designated arbitrator will set the hearing on his next reserved date in the Club city unless the parties agree otherwise. If a grievance is set for hearing and the hearing date is then postponed by a party within thirty (30) days of the hearing date, the postponement fee of the arbitrator will be borne by the postponing party unless the arbitrator determines that the postponement was for good cause. Should good cause be found, the parties will share any postponement costs equally. If the arbitrator in question cannot reschedule the hearing within thirty (30) days of the postponed date, the case may be reassigned by the Notice Arbitrator to another panel member who has a hearing date available within the thirty (30) day period. At the hearing, the parties to the grievance and the NFLPA and Management Council will have the right to present, by testimony or otherwise, and subject to Section 5, any evidence relevant to the grievance. All hearings will be transcribed.

If a witness is unable to attend the hearing, the party offering the testimony shall inform the other party of the identity and unavailability of the witness to attend the hearing. At the hearing or within fourteen (14) days thereafter, the party offering the testimony of the unavailable witness must offer the other party two possible dates within the next forty-five (45) days to take the witness' testimony. The other party shall have the opportunity to choose the date. The record should be closed sixty (60) days after the hearing date unless mutually extended notwithstanding any party's failure to present post-hearing testimony within the above-mentioned time period. If a witness is unavailable to come to the hearing, the witness' testimony may be taken by telephone conference call if the parties agree. In cases where the amount claimed is less than $25,000, the parties may agree to hold the hearing by telephone conference call. If either party requests post-hearing briefs, the parties shall prepare and simultaneously submit briefs except in grievances involving non-suspension Club discipline where less than $25,000 is at issue, in which cases briefs will not be submitted. Briefs must be submitted to the arbitrator postmarked no later than sixty (60) days after receipt of the last transcript.

Section 8. Arbitrator's Decision and Award: The arbitrator will issue a written decision within thirty (30) days of the submission of briefs, but in no event shall he consider briefs filed by either party more than sixty (60) days after receipt of the last transcript, unless the parties agree otherwise. The decision of the arbitrator will constitute full, final and complete disposition of the grievance, and will be binding upon the player(s) and Club(s) involved and the parties to this Agreement; provided, however, that the arbitrator will not have the jurisdiction or authority: (a) to add to, subtract from, or alter in any way the provisions of this Agreement or any other applicable document; or (b) to grant any remedy other than a money award, an order of reinstatement, suspension without pay, a stay of suspension pending decision, a cease and desist order, a credit or benefit award under the Bert Bell/Pete Rozelle NFL Player Retirement Plan, or an order of compliance, with a specific term of this Agreement or any other applicable document, or an advisory opinion pursuant to Article XIII (Committees), Section 1(c). In the event the arbitrator finds liability on the part of the Club, he shall award interest beginning one year from the date of the last regular season game of the season of the grievance. The interest shall be calculated at the one-year Treasury Bill rate published in the

Wall Street Journal as of March 1 (or the next date published) of each year, and such rate shall apply to any interest awarded during each such subsequent twelve (12) month period.

Section 9. Time Limits: Each of the time limits set forth in this Article may be extended by mutual written agreement of the parties involved. If any grievance is not processed or resolved in accordance with the prescribed time limits within any step, unless an extension of time has been mutually agreed upon in writing, either the player, the NFLPA, the Club or the Management Council, as the case may be, after notifying the other party of its intent in writing, may proceed to the next step.

Section 10. Representation: In any hearing provided for in this Article, a player may be accompanied by counsel of his choice and/or a representative of the NFLPA. In any such hearing, a Club representative may be accompanied by counsel of his choice and/or a representative of the Management Council.

Section 11. Costs: All costs of arbitration, including the fees and expenses of the arbitrator and the transcript costs, will be borne equally between the parties. Notwithstanding the above, if the hearing occurs in the Club city and if the arbitrator finds liability on the part of the Club, the arbitrator shall award the player reasonable expenses incurred in traveling to and from his residence to the Club city and one night's lodging.

Section 12. Payment: If an award is made by the arbitrator, payment will be made within thirty (30) days of the receipt of the award to the player or jointly to the player and the NFLPA provided the player has given written authorization for such joint payment. The time limit for payment may be extended by mutual consent of the parties or by a finding of good cause for the extension by the arbitrator. Where payment is unduly delayed beyond thirty (30) days, interest will be assessed against the Club from the date of the decision. Interest shall be calculated at double the one-year Treasury Bill rate published in the Wall Street Journal as of March 1 (or next date published) of each year, and such rate shall apply to the interest awarded during each subsequent twelve (12) month period in lieu of continuation of any pre-award interest. The arbitrator shall retain jurisdiction of the case for the purpose of awarding post-hearing interest pursuant to this Section.

Section 13. Grievance Settlement Committee: A grievance settlement committee consisting of the Executive Director of the NFLPA and the Executive Vice President for Labor Relations of the NFL shall have the authority to resolve any grievance filed under this Article. This committee shall meet periodically to discuss and consider pending grievances. No evidence will be taken at such meetings, except parties involved in the grievance may be contacted to obtain information about their dispute. If the committee resolves any grievance by mutual agreement of the two members, such resolution will be made in writing and will constitute full, final and complete disposition of the grievance and will be binding upon the player(s) and the Club(s) involved and the parties to this Agreement. Consideration of any grievance by this committee shall not in any way delay its processing through the non-injury grievance procedure described in this Article, and no grievance may be resolved pursuant to this Section once an arbitration hearing has been convened pursuant to Section 7 hereof.

ARTICLE XXVII

IMPARTIAL ARBITRATOR

Section 1. Selection: The parties shall agree upon an Impartial Arbitrator who shall have exclusive jurisdiction to determine disputes that are specifically referred to the Impartial Arbitrator pursuant to the express terms of this Agreement.

Section 2. Scope of Authority: The powers of the Impartial Arbitrator and the rights of the parties in any proceeding before him or her shall be solely to determine disputes that are specifically referred to the Impartial Arbitrator pursuant to the express terms of this Agreement. In no event shall the Impartial Arbitrator have any authority to add to, subtract from, or alter in any way the provisions of this Agreement.

Section 3. Effect of Rulings: Rulings of the Impartial Arbitrator shall upon their issuance be final and binding upon all parties, except as expressly specified under this Agreement or as expressly agreed to among all parties.

Section 4. Discovery: In any of the disputes described in this Agreement over which the Impartial Arbitrator has authority, the Impartial Arbitrator shall, for good cause shown, grant reasonable and expedited discovery upon the application of any party where, and to the extent, he determines it is reasonable to do so and it is possible to do so within the time period provided for his determination. Such discovery may include the production of documents and the taking of depositions.

Section 5. Compensation of Impartial Arbitrator: The compensation to and costs of the Impartial Arbitrator in any proceeding brought pursuant to this Agreement shall be equally borne by the NFL and the NFLPA. In no event shall any party be liable for the attorneys' fees incurred in any such proceeding by any other party.

Section 6. Procedures: All matters in proceedings before the Impartial Arbitrator shall be heard and determined in an expedited manner. A proceeding may be commenced upon 48 hours written notice served upon the party against whom the proceeding is brought and the Impartial Arbitrator, and the arbitration, shall be deemed to have been commenced on the second business day after such notice was given. All such notices and all orders and notices issued and directed by the Impartial Arbitrator shall be served upon the NFL and the NFLPA, in addition to any counsel appearing for individual NFL players or individual Clubs. The NFL and the NFLPA shall have the right to participate in all such proceedings, and the NFLPA may appear in any proceedings on behalf of any NFL player who has given authority for such appearance.

Section 7. Selection of Impartial Arbitrator: In the event that the NFL and the NFLPA cannot agree on the identity of an Impartial Arbitrator, the parties agree to submit the issue to the President of the ABA who shall submit to the parties a list of eleven attorneys (none of whom shall have nor whose firm shall have represented within the past five years players, player representatives, clubs, or owners in any professional sport). If the parties cannot within thirty days of receipt of such list agree to the identity of the Impartial Arbitrator from among the names on such list, they shall alternatively strike names from said list, until only one name remains, and that person shall be the Impartial Arbitrator. The first strike shall be determined by a coin flip. The Impartial Arbitrator shall serve for a two-year term commencing on the date of entry of the order of appointment, unless the parties agree otherwise. The Impartial Arbitrator shall continue to serve for successive two-year terms unless notice to the contrary is given either by the NFL or the NFLPA. Such notice shall be given to the other party and the Impartial Arbitrator within the ninety days preceding the end of any term, but no later than thirty days prior to the end of such term. If necessary, a new Impartial Arbitrator shall be selected in accordance with the procedures of this Section. The NFL and NFLPA may dismiss the Impartial Arbitrator at any time and for any reason upon their mutual consent.